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Supreme Court, U.S.
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No. 97-650

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE DALLAS MORNING NEWS
Petitioner

v.

UNITED STATES OF AMERICA, TIMOTHY JAMES MCVEIGH
and TERRY LYNN NICHOLS
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Tenth Circuit

TERRY LYNN NICHOLS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The timing of the Dallas Morning News' Petition for Certiorari demonstrates the wisdom of the 10th Circuit's opinion below. Counsel in the midst of a highly publicized death penalty trial should not be faced with the distraction of defending, either on appeal or on petition for writ of certiorari, a discretionary determination by the trial judge that the defendant's allegedly incriminating nine-hour statement to law enforcement should not be made public prior to trial. Neither question presented by Petitioner merits this Court's attention and the petition should be denied.

I. BACKGROUND

As this opposition is being drafted, Respondent Terry Lynn Nichols is on trial for his life, accused of aiding and abetting the most horrible act of domestic terrorism in our country's history -- the bombing of the Murrah Federal Building in Oklahoma City, Oklahoma. Lead counsel for Mr. Nichols is embroiled in the fourth week of individual voir dire, endeavoring to qualify twelve jurors able to fairly try a capital case in the face of historic adverse publicity about Mr. Nichols' alleged involvement in the bombing, as well as the highly publicized conviction and death sentence for Mr. Nichols' co-defendant and co-respondent, Timothy McVeigh.

Petitioner seeks access to a F.B.I. report of a statement that Mr. Nichols made to the F.B.I. just prior to his arrest as a material witness, as well as redacted portions of legal pleadings

discussing the substance of his statement. The only reason Petitioner can claim any right of access to the statement at all is because the F.B.I. report of Mr. Nichols' statement became part of the record in the case when Mr. Nichols and Mr. McVeigh filed written pleadings seeking to vindicate rights guaranteed by the Fourth, Fifth and Sixth Amendments.

During pretrial proceedings, Mr. Nichols had argued that his statement should be suppressed as a product of police coercion and violations of the Miranda rule. See Pet. App. 92-100. Mr. McVeigh had argued that the statement was inadmissible hearsay as to him. Pet. App. 112-123. The trial court held a four day long public hearing on the motion to suppress, at which 28 witnesses testified and 212 of the 213 exhibits were made public. While declining to suppress Mr. Nichols' statement, the trial court did find that the statement was inadmissible hearsay as to Mr. McVeigh, Pet. App. 112-123, and later severed the two trials in part on that ground. See Pet. App. pp. 143-146. In explaining the severance decision in a public opinion, the trial court noted that pursuant to Fed. R. Crim. Pro. 14, it had reviewed the sealed material in camera to assess the merits of the defendants' arguments. Pet. App. 130-131.

The trial court's decision to sever the trials of the two defendants was but one of a number of unusual, but necessary pretrial decisions taken to ensure that the defendants accused of the Oklahoma City bombing would receive fair trials. The 10th Circuit was compelled to remove the original trial judge because of

the appearance of bias. See Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995). The trial venue was moved from Oklahoma to Denver, Colorado because inflammatory pretrial publicity in the original trial venue had "demonized" the defendants. United States v. McVeigh, 918 F. Supp. 1467, 1472 (D. Colo. 1996).[1] And even while moving the trial to Colorado, the trial court recognized the unprecedented nature of the case would require additional extraordinary measures to guarantee the defendants' fair trial rights:

> It is apparent that some special precautions and logistical arrangements must be taken in preparation for trial of these charges in any location. The scope and intensity of the public interest necessitates it. . . . Moreover, a failed attempt to select a jury would, itself, cause widespread public comment creating additional difficulty on beginning again at another place for trial.

McVeigh, 918 F. Supp. at 1472. In concluding its opinion granting a change of venue, the trial court articulated its finding that in an unprecedented case such as this, reaching a just verdict would require that jurors "have adequate protection from external influences." Id. at 1473. Confirming the unusual circumstances of the case, in a departure from standard federal practice, the trial court has permitted counsel to individually question potential jurors during voir dire to accurately assess the degree to which pretrial publicity may have caused juror bias.

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[1] Moving the trial to Colorado prompted such outrage in Congress that a special statute was passed effectively amending Fed. Rule Crim. Pro. 53 to provide a closed-circuit broadcast of trial proceedings back to the victims in Oklahoma. Section 235 of Public Law 104-132.

Thus, it is against a backdrop of monumental pretrial publicity and extensive factual findings by the trial court that the Tenth Circuit found that the trial judge's orders sealing Mr. Nichols' statement to the F.B.I. (and certain portions of motions making reference to that statement), "were narrowly tailored to the compelling fair trial interest at stake." Pet. App. at 21. As the Court of Appeals found, "many of the other avenues often available to limit the prejudicial publicity that would arise from disclosure of these materials -- such as change of venue, a continuance, voir dire, and admonishments to the jury -- had already been exhausted by the time the orders were entered or were ongoing processes utilized by the court to try to protect the defendants' right to a fair trial from the substantial publicity that was occurring." Pet. App. at 21. In addition to reviewing the explicit findings made by the trial court, the Court of Appeals itself conducted an in camera review of the sealed and redacted materials, concluding that the trial judge had "properly sealed only those portions of the documents at issue necessary to protect, respectively, the integrity of suppressed evidence and the defendant's ability to argue effectively that separate trials were warranted." Pet. App. 21-22.

The 10th Circuit's opinion is entirely consistent with Fed. R. Crim. Pro. 14 (which directs a court to examine in camera any statements or confessions in deciding whether to sever trials), this Court's prior decisions relating to the dangers of pretrial publication of a defendant's statements, see Rideau v. Louisiana,

373 U.S. 723 (1963) (reversal of murder conviction where substance of jailhouse "interview" between sheriff and defendant was publicized to thousands of people in trial venue, before jury was sworn); Irvin v. Dowd, 366 U.S. 717 (1961) (death sentence overturned where jury trying case was not impartial because of pervasive pretrial publicity, including publicity relating to defendant's confession), and the important First Amendment interests implicated by a public criminal trial. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

Most importantly, the 10th Circuit's opinion is consistent with the universally accepted view, ignored by Petitioner, that when the media's First Amendment right of access clashes with a criminal defendant's right to a fair trial, the fair trial right, the "most fundamental of all freedoms," Estes v. Texas, 381 U.S. 532, 540 (1965)), cannot fall to the wayside. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986) (recognizing that "there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity"); cf. L. Tribe, American Constitutional Law 629 (1978)(suggesting that First Amendment rights of access to court proceedings are only limited by a defendant's right to a fair trial).[2] "Given the pervasiveness of modern communications and the

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[2] See also, United States v. Cojab, 996 F.2d 1404, 1405 (2d cir. 1993) (freedom of press and public to attend criminal tribunals and pretrial proceedings is not designed to override right of defendant to receive fair verdict from impartial jury); The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512 (11th Cir. 1991) (when First amendment claims infringe upon Sixth Amendment right to trial by impartial jury, asserted First Amendment interest

difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that that balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333. 362 (1966). The trial court, in sealing Mr. Nichols' statement, was doing precisely this and the 10th Circuit properly affirmed.

II. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER THE FIRST AMENDMENT RIGHT OF ACCESS EXTENDS TO DOCUMENTS FILED IN CONNECTION WITH CRIMINAL PRE-TRIAL PROCEEDINGS.

The first question presented by the Petitioner is a red-herring. Petitioner asks that the Court grant certiorari to "decide whether the First Amendment right of access extends to documents filed in connection with criminal pre-trial proceedings." Pet. Brf. at 9. Yet, in the context of this case, any such determination could not change the result. Although the 10th Circuit declined to decide the issue, it nonetheless assumed for purposes of its decision that a First Amendment Right of access does apply. Pet. App. at 14 "("[I]f we find the district court orders satisfy the First Amendment standard, as we do, we will necessarily find that the orders satisfy the common law standard as well."). Thus, for all intents and purposes, Petitioner won this point below. Both the trial judge and the Court of Appeals applied

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must yield to "most fundamental of all freedoms," the right to a fair trial for the accused) (quoting Estes, 381 U.S. at 540); Norris v. Risely, 918 F.2d 828, 832 (9th cir. 1990) ("Where fair trial rights are at significant risk . . . the first amendment rights of trial attendees can and must be curtailed at the courthouse door.").

the multi-part balancing analysis found in Press-Enterprise to determine whether the sealing of Mr. Nichols' statement was proper. Pet. App. 14-22.

Petitioner is asking this Court to grant certiorari to decide a Constitutional question that the Court below found unnecessary to reach, and that if decided in favor of Petitioner, would not change the outcome of the case. Federal courts in general, and this Court in particular, are not in the business of unnecessarily reaching out to decide constitutional questions. See Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

Petitioner's real complaint may be that it disagrees with both the trial court and 10th Circuit's application of the Press-Enterprise balancing test to the facts of this case. But an arguably erroneous implementation of the correct legal standard is no basis for granting certiorari. See N.L.R.B. v. Mexia Textile Mills, 339 U.S. 563, 573 (1950) (Frankfurter, J., dissenting) (asserting that the burden of resolving issues of great import "was assumed to preclude the grant of certiorari in cases, however erroneously decided below, in which the incidence of error was too small compared with the drain that their consideration would make on the thought and energy demanded of this court by the cases which inevitably belong there"); John Marshall Harlan, Manning the Dikes

at 18 (address before the New York Bar Association) (1958)("[T]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to ensure certiorari."). This Court is not a super-appellate court with the job of rebalancing for a third time factors previously weighed by two lower federal courts. See generally, Robert L. Stern & Eugene Gressman, Supreme Court Practice (5th ed. 1978) §4.18 at 298 ("While the 'perceived correctness' of the decision below may effect or emphasize the appropriateness of review, undue concentration on the errors committed by the lower court could transform the Supreme Court into another tribunal of errors and appeals, contrary to its constitutional mission."); Eugene Gressman, "Much Ado About Certiorari," 52 Georgetown L. J. 742, 761 (1964) (arguing that if the Supreme Court is to perform its essential functions, the lower appellate courts must be the final forum for questions of trial error).

What is more, Petitioner cannot realistically argue that the decision was incorrect. Appellants point to no case with similar facts from another Circuit Court of Appeals that would suggest a capital defendant's statement to law enforcement ought be released to the media prior to jury selection in a highly publicized case. To the contrary, the cases on point from this Court reverse convictions where the trial judge failed to take adequate precautions against the unfair prejudice generated by pretrial release of a confession. Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). In short, even

applying the standard urged by Petitioner, no appellate court in this country would compel the release of Mr. Nichols' statement to the media prior to selection of his jury.

III. IN THE CONTEXT OF THIS DISPUTE, WHETHER THE TRIAL JUDGE'S SEALING ORDER WAS REVIEWED ON DIRECT APPEAL OR VIA PETITION FOR WRIT OF MANDAMUS IS NOT A QUESTION WORTHY OF THIS COURT'S CONSIDERATION.

Petitioner has accurately identified a division in the Courts of Appeals with respect to the means by which a media party should obtain appellate review of a trial court's decision to seal documents in a criminal case. Some circuits view the sealing of documents as immediately appealable as collateral orders under the Cohen doctrine. See 28 U.S.C. §1291; Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). And other circuits, including the Tenth (which disfavors interlocutory appeals during the criminal trial process, see D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1445 (10th Cir. 1984) (en banc)), view mandamus as the appropriate remedy. This is a distinction without a difference.

Similar cases involving the sealing of criminal trial documents originating from different locales are unlikely to be decided differently merely because a different procedural mechanism is used to review the trial court's decision. Specifically under the facts of this case, review on direct appeal rather than by petition for mandamus would have no impact in the event of a remand. The Court below ordered full briefing on the matter, heard

oral argument, and closely scrutinized the sealed documents to ensure that the trial judge's sealing orders did not extend beyond what was necessary to protect the defendants' fair trial rights. Petitioner would get no additional consideration from the Court of Appeals were this matter reviewed on appeal. If this Court is to decide whether direct appeal or mandamus is the proper way to obtain review of a sealing decision during a criminal trial, it should do so in a case where that decision would have some impact.

We would note that many of the this Court's First Amendment opinions do arise out of petitions for extraordinary writs. Indeed, Press-Enterprise itself sprang from a mandamus petition out of the California state court system. Federal Rule of Appellate Procedure 21 governing extraordinary writs permits an appellate court to make a threshold determination whether a petition for a mandamus has any merit before ordering an answer from the responding party. See F.R.A.P. 21 (b). In the context of any criminal case, but especially this one -- where the media and others have shown uncommonly itchy trigger fingers with respect to the appellate review weapon[3] -- such a threshold determination

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[3] This matter itself originated from multiple consolidated appeals below. Nos. 96-1409 and 96-1464. In addition, Media Representatives previously had filed a petition for writ of mandamus seeking access to court audio tape recordings of pre-trial proceedings. See United States v. McVeigh, 931 F. Supp. 753 (D. Colo. 1996), pet. for mandamus denied, No. 96-1282 (order filed July 9, 1996) (10th Cir.). And the trial court's invocation of the rule against witnesses prompted the United States as well as crime victims to file appeals or petitions for mandamus seeking access to court proceedings for relatives of bombing victims. See United States v. McVeigh, 106 F.3d 325 (10th Cir. 1996) (Docket nos. 96-1469, 96-1475, 96-1484).

before full briefing is ordered is advisable.

"Because of the compelling interest in prompt trials, the Court has interpreted the requirements of the collateral order exception to the final judgment rule with utmost strictness in criminal cases." United States v. Flanagan, 465 U.S. 259, 265 (1984). Defense counsel for Mr. Nichols have had to devote significant resources to responding to multiple appellate matters, time that otherwise would have been devoted to the substantive work of reviewing discovery and preparing for trial. Repeated interruptions of trial preparation to address media appeals work substantial unfairness on a defendant likely to have fewer resources available than either the prosecution or the media parties, but a much greater interest in maintaining the confidentiality of prejudicial documents. The 10th Circuit, in its wisdom, determined that a media request to review a trial court's sealing decision should be subject to the threshold determination permitted by F.R.A.P. 21, before requiring defense counsel to expend limited resources protecting the defendant's fair trial rights at the Circuit level. No injustice results from this procedural limitation on the media's right to disrupt an ongoing criminal proceeding.

In sum, trial counsel is in the middle of a death penalty trial that is expected to last several months. Being distracted from the merits of the client's defense for one interlocutory media appeal is bad enough, but to be forced to respond with full briefing to a grant of certiorari on an issue of dubious national

significance would be an unnecessary distraction, particularly where the client's life may hang in the balance.

III. CONCLUSION

The unique factual circumstances of the Oklahoma City bombing have demanded unusual precautions to ensure the defendants receive fair trials. The circumstances are sui generis. Yet, in weighing the competing principles at stake, the 10th Circuit and the trial court diligently applied to these extreme facts the general guidelines set by this Court in Press-Enterprise. Were this Court to decide either of the questions presented by Petitioner, the outcome would not change.

This Court "has said again and again that the writ of certiorari ought not be employed to bring here cases which, in their essential impact, concern a restricted and perhaps unique set of circumstances and do not involve the pronouncement by a Court of Appeals of a general doctrine on which this Court ought to have the last say." N.L.R.B. v. Mexia Textile Mills, 339 U.S. 563, 573 (1950) (Frankfurter, J., dissenting). This is one such case.

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The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of TERRY LYNN NICHOLS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI and accompanying MOTION TO PROCEED IN FORMA PAUPERIS was served in compliance with Sup. Ct. Rules 29.3, 29.4, and 29.5 this 6th day of November, 1997 by first class mail on the following interested parties:

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